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No. [redacted] 14

In the Supreme Court of the United States

October Term, 1939

[redacted]

National Labor Relations Board, and Edwin S. Smith, [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 707

REPUBLIC STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND STEEL WORKERS ORGANIZING COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. VIII, 6277–6292) is reported in 107 F. (2d) 472. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. II, 833–1109) are reported in 9 N. L. R. B. 219.

JURISDICTION

The decree of the court below (R. VIII, 6294–6299) was entered on January 2, 1940. The petition for a writ of certiorari was filed on February

7, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's finding that petitioner's unfair labor practices constituted the major cause of the strike was supported by substantial evidence.

2. Whether, in the circumstances of this case, the Board erred in ordering petitioner to reinstate (a) employees who were convicted of various minor offenses committed in connection with the strike, and (b) employees not convicted of any unlawful act but who were asserted to have committed various offenses in connection with the strike.

3. Whether Section 6 of the Norris-La Guardia Act, which provides that members of an organization participating in a labor dispute shall not be held responsible in any federal court for the unlawful acts of other members except upon clear proof of actual participation in or authorization or ratification of such acts, was properly considered by the Board and applied by the court below in rejecting petitioner's contention that all of the strikers should be denied reinstatement because of the unlawful acts committed by some of them.

4. Whether, as part of a back-pay order, the Board could validly require petitioner to deduct from the payments to employees any sums which

they have received for work performed upon work-relief projects and to pay such sums to the appropriate governmental agencies.

5. Whether the Board could validly require petitioner to make whole for pay lost employees who were locked out, discharged, or laid off in violation of the Act, but were thereafter reinstated by petitioner.

6. Whether the Board, in ordering reinstatement of employees who went on strike because of petitioner's unfair labor practices, could properly require petitioner to place those strikers for whom jobs were not available at the time of the Board's order upon a single preferential hiring list, and to offer such strikers employment at any of petitioner's plants in the area where the strike occurred, as such employment becomes available.

7. Whether the charge was adequate to support the complaint and order issued by the Board against petitioner.

8. Whether a fair hearing was afforded petitioner by the Board.

9. Whether the Board's findings that petitioner committed unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act are supported by substantial evidence.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. IV, Sec. 151 *et seq.*) and

the Norris-La Guardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70; 29 U. S. C., Sec. 101 *et seq.*) are set forth in the Appendix, *infra*, p. 31 *et seq.*

STATEMENT

Charges (R. I, 1–12) having been filed by the Steel Workers Organizing Committee, a labor organization, the Board, on July 16, 1937, issued its complaint against petitioner. The complaint alleged, in substance, that petitioner had engaged and was engaging in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act, and that, as a result of certain of these unfair labor practices and of petitioner's refusal to enter into a written contract with the S. W. O. C., petitioner's employees had gone on strike (R. I, 13–24). Petitioner filed an answer denying these allegations and setting forth various defenses (R. I, 26–35). Pursuant to notice a hearing was held in Washington, D. C., from July 21 to 23, 1937, before the members of the Board, and in Canton, Youngstown, and Cleveland, Ohio, from August 9 to September 27, 1937, before a Trial Examiner of the Board. Petitioner and the S. W. O. C. were represented by counsel and participated in the hearing with full opportunity to examine and cross-examine witnesses and to introduce evidence.

On April 8, 1938, the Board issued a decision containing findings that petitioner had engaged in the unfair labor practices alleged and an order requiring petitioner to cease and desist therefrom

and to take certain affirmative action to remedy them (R. I, 59–309). Petitioner filed a petition to review the Board's order in the court below, contending, *inter alia,* that the proceedings had were not sufficient to satisfy the requirements of due process. On June 14, 1938, the Board, upon due notice to the parties (R. I, 313–315), set aside its findings and order for the purpose of further proceedings (R. I, 317).[1] On July 8, 1938, the Board issued proposed findings of fact and a proposed order in the case (R. I, 324–578). Both petitioner and S. W. O. C. filed exceptions (R. I, 580–725, 780–781) and briefs and participated in oral argument held before the Board on August 11, 1938 (R. I, 782–832). On October 18, 1938, the Board, upon the entire record in the case, issued its Decision and Order (R. II, 833–1109). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

Petitioner, a large manufacturer of steel, is substantially engaged in interstate commerce (R. II,

[1] Upon application by petitioner, the court below enjoined the Board from vacating its order and ordered that the transcript of record be filed by the Board and the case proceed. Thereafter this Court held that the court below had no jurisdiction to enter these orders. *In the Matter of the Petition of the National Labor Relations Board for a writ of Mandamus*, 304 U. S. 486. The court below then vacated the orders in question and the Board, upon due notice, vacated its findings and order of April 8, 1938 (R. I, 313–317).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the following references are to the supporting evidence.

843–845). From the time the Act became effective until this Court held it valid in April 1937, petitioner maintained in each of its Ohio plants here involved [3] substantially identical "Plans of Employee Representation" (R. II, 846, 849, 980, 981, 1003–1004, 1030, 1041–1042; II, 1660–1662, III, 1881–1887, 2107–2108, 2486–2493, V, 3968, VI, 4612, 5095–5096, 5115–5117, 5283, 5296, 5455, 5466, 5506, 5672, 5691).[4] Upon establishment of these Plans in June 1933, all employees automatically became members, without opportunity to express their preference (R. II, 846, 849, 980–981, 1004–1005, 1030, 1042; II, 1642–1644, III, 1881–1886, 1999–2000, 2106–2112, 2023, 2488–2490, VI, 4289–4294, 4602). Petitioner had an equal number of votes with the employees on each governing committee and could veto any action, including amendments (R. II, 847–849, 1005–1006, 1031; II, 1645–1646, 1669–1671, III, 2112–2118,

[3] The more important of such plants are located in Massillon, Canton, Cleveland, Youngstown, Warren, and Niles (R. II, 843–844, 846, 980; II, 1198–1199, VI, 4290, 4948, VII, 5086).

[4] Two of the plants involved, the Canton Tin Plate Mill and the Corrigan, McKinney plant in Cleveland, were not owned by petitioner on July 5, 1935, but were acquired shortly thereafter. However, plans identical in material provisions with those in petitioner's plants had been introduced by petitioner's predecessors in substantially the same manner and at the same time and continued in effect in the same way as the Plans in petitioner's plants; no point is made of the change in ownership (R. II, 981, 1041–1042; II, 1608–1609, 1618–1619, 1636–1639, IV, 2828–2830, VI, 4262, 4275, VII, 5095–5096, 5115–5117, 5270–5280, 5751–5762, 5786).

2500–2501, 2529, VI, 4604–4605, VII, 5461–5466, 5516, VIII, 5916).

In June 1936 the S. W. O. C. began to organize petitioner's employees (R. II, 860; II, 1557, 1578, III, 1693, 1772). On July 2, 1936, petitioner mailed to each of its employees a prepared statement containing a bitter and sweeping attack upon the S. W. O. C. and an open warning against "disloyalty" to petitioner (II, 861–863; IV, 2854, VII, 5777–5779). Commencing at about this time and for months thereafter, S. W. O. C. organizers and members were followed and otherwise kept under surveillance by petitioner's private police (R. II, 864–866, 1010, 1043, 1046–1051, 1054–1056, 1058, II, 1558–1577, 1580–1583, 1588–1594, III, 2047–2050, 2065–2066, IV, 2621–2625, 2683–2687, 2698–2699, 2714, 2720–2731, 2753–2756, 2761–2762, 2797–2799, 2803–2805, 2825–2826, VII, 5269, 5505). These tactics resulted in intimidation of the employees, and union meetings were secretly held (R. II, 866, 983, 1043; II, 1561–1563, 1584–1586, III, 1773, IV, 2722–2724, 2576). Nevertheless, these meetings were subjected to surveillance by petitioner's police and employees who attended were followed to their homes (R. II, 865, 1043, 1046–1047, 1050–1051, 1054, 1058, II, 1564, IV, 2621–2625, 2683–2684, 2688, 2693–2699, 2709, 2714, 2721–2731, 2753–2754).[5]

[5] Illustrative of the success of petitioner's systematic intimidation of employees is the failure of a S. W. O. C. meet-

Employees' lockers were systematically broken into and searched for S. W. O. C. cards (R. II, 1056, 1059; IV, 2671, 2806–2807, VII, 5711–5712). Petitioner's police made repeated attempts to prevent the dissemination of S. W. O. C. literature by threatening the recipients (R. II, 1063; IV, 2578–2579) and by brutally beating organizers engaged in the peaceful distribution of literature outside the plant gates (R. II, 1063–1065; IV, 2548–2551, 2569–2570, 2580–2581, 2594–2599). Meetings were repeatedly held in all of petitioner's plants at which superintendents and foremen vilified the S. W. O. C., threatened employees with discharge or shutdown of the plant if they joined, and distributed antiunion literature (R. II, 871–872, 984–986, 991, 996, 1000, 1015–1016, 1019; III, 1740–1741, 1763, 1789–1793, 1845, 1914–1915, 1920–1922, 1938, 2003–2005, 2092–2102, 2157–2158, 2170–2172, 2200–2201, 2211–2212, 2257–2258, VII, 5612–5669, 5767–5776).

Attempts by Employee Representatives to change the Plans so as to make them more respon-

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ing for Negro employees scheduled to be held at Cleveland in August 1936 (R. II, 1063; IV, 2565–2567). The employees were afraid to attend because a carload of petitioner's police cruised near the meeting place (R. II, 1063; IV, 2566–2567, 2573). In January 1937 company police were stationed outside the meeting hall in Cleveland and watched the employees entering (R. II, 1056, 1058; IV, 2565, 2569–2570, 2574–2575, 2580, 2754–2755, 2809). In Youngstown company police watched all S. W. O. C. meetings and on at least one occasion spoke menacingly to the organizers (R. II, 1008–1009; III, 2046–2052).

sive to the employees' needs were rejected by petitioner (R. II, 1006–1008; III, 2122–2123, 2128–2129, VII, 5530–5536). Instead, petitioner utilized banquets and meetings attended by the Representatives to emphasize their obligation to keep the S. W. O. C. out of the plants (R. II, 1010–1011, 1066–1067; IV, 2795, 2842–2843, 2845–2846, VII, 5523, 5525, 5767). Various Representatives were offered promotions and other special inducements if they would campaign against the S. W. O. C. (R. II, 1047–1048, 1053–1054; IV, 2727–2729, 2793–2796). On March 18, 1937, the day after the United States Steel Corporation entered into a contract with the S. W. O. C., petitioner called a meeting of Employee Representatives from all of its northern plants; a motion was unanimously adopted approving petitioner's opposition to outside labor organizations (R. II, 868–870; III, 2128, VII, 5542–5544, VIII, 6150). Superintendents, foremen, and Employee Representatives used threats in soliciting the signatures of employees during working hours to petitions expressing satisfaction with the Plans and opposition to the S. W. O. C. (R. II, 870–871, 984–985, 1066; III, 1741, 1903–1904, 1912–1914, 2021–2025, IV, 2641–2643, 2670, 2677–2678, 2841–2842, 2847–2848, VII, 5025–5026). Following the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, the Plans were amended, under petitioner's direction, so as to

eliminate employer representation on the committees, petitioner's veto power, and the financial support which petitioner had theretofore openly extended to the Plans (R. II, 850–853, 981–982, 989–990, 1016–1017, 1034–1035, 1041–1042, 1067, II, 1678–1680, III, 1905, V, 3968, 3981–3983, 3993–3995, 4007–4008, VII, 5109–5110, 5428–5449, 5452–5455, 5492–5501, 5536).[6]

Discharges on account of union sympathy or activity, repeatedly threatened both at meetings and in private warnings by superintendents to employees suspected of union membership, were actually carried out in at least 18 instances. At the very beginning of the union organizing campaign the first employees to join or become active were

[6] In some of the plants a pretense was made at establishing new organizations, which were merely the Plans as amended, with the same officers and Representatives as before (R. II, 850–853, 980–982, 989–990, 1016–1017, 1034–1035, 1041–1042, 1067; II, 1609–1612, 1629–1630, 1638, 1667, 1674–1680, 1682–1684, IV, 2836–2845, V, 3980–3987, 4006–4007, VI, 4621, VII, 5282–5283, 5427–5428, 5452–5455, 5492–5501). Superintendents and foremen assisted Employee Representatives in securing signatures to membership cards of the "new" organizations, threatening that employees who did not sign would lose their jobs (R. II, 853, 859–860, 1034–1037, 1068–1069; III, 1978–1980, 2005–2011, 2016, 2031–2034, 2377–2381, 2402–2404, 2442–2443, 2461–2464, 2472–2479, 2509–2512, IV, 2534–2540, 2839–2841, 2856–2858, 2861–2863, 2871–2874). Meetings at which Employee Representatives explained the "new" organizations to employees were held on company time and property (R. II, 853, 877–878, 990–991, 1019; III, 1714–1715, 1799–1803, 1837–1846, 1855, 1860, 1914–1915, 1935–1936, 1980, 2101–2105, 2144–2149, 2155–2164, 2166).

discharged (R. II, 983, 1043–1050, III, 1772–1781, IV, 2616–2647, 2682–2689, 2693–2694, 2713–2715, 2720–2746, 2788–2794); after union officers were elected they were discharged (R. II, 1011–1012, 1051–1057; III, 2060–2075, IV, 2692–2714, 2766–2827); and from time to time enough ordinary union members were pointedly discharged to warn others of a similar fate if they became active (R. II, 859–860, 995–1003, 1058–1062; III, 1738–1769, 2005–2011, IV, 2607–2612, 2648–2652, 2667–2675, 2752–2766).

On March 30, 1937, the S. W. O. C. wrote to Girdler, president of petitioner, requesting a conference and submitting a proposed contract providing for recognition of the S. W. O. C. as the collective-bargaining representative of its members, for a procedure whereby grievances might be adjusted, and for protection of the employees against discrimination, interference, restraint, or coercion because of union membership (R. II, 873; VII, 5132, VIII, 6149–6157). The proposed contract did not provide for changes in wages, hours, or working conditions but merely continued the present conditions (R. II, 1075; VII, 5715–5718). Petitioner did not reply to this communication (R. II. 873; VIII, 6146–6147). On May 3 the S. W. O. C. sent a telegram to petitioner pointing out that the letter of March 30 had been ignored, that widespread unrest existed among the employees, which was increased by the lay-offs of

union members, and that a strike might occur unless petitioner negotiated concerning the proposed contract (R. II, 873; VII, 5128–5129; VIII, 6146–6147). On May 5 petitioner's director of industrial relations answered that "In view of Wagner Act see no necessity for signed contract," and suggested a conference for May 11 (R. II, 874; VIII, 6147–6148). On the same day petitioner locked out the 680 employees working at the Canton Tin Plate Mill, where the S. W. O. C. claimed a 90-percent membership (R. II, 980, 986-989; III, 1716–1717, 1786, 1791, V, 4182, 4186). Superintendent Thomas informed employees who inquired that "he did not believe the mills would start up until we get rid of that union" (R. II, 986-987; III, 1716–1717).[7] The mill remained closed until May 24 (R. II, 987; III, 1717, 1790–1791, V, 4184).

Representatives of petitioner and the S. W. O. C. met on May 11 but no progress toward an agreement was made (R. II, 875, 1073; VII, 5715–5716). On the same day, petitioner issued a statement to its employees berating the S. W. O. C., terming it irresponsible, and praising the Plans as successful instruments for collective bargaining (R. II, 875-

[7] He had previously expressed repeated warnings to S. W. O. C. members that unless the union activity in the Canton Tin Plate Mill ended, petitioner would close the mill and put "everyone out of work" (R. II, 985–986; III, 1686–1688, 1712–1713, 1789–1790, VI, 4264–4266). Thomas did not testify.

877; IV, 2817, VII, 5715–5718). Beginning on the same evening and continuing through the succeeding two weeks, numerous meetings announced by foremen were held in the plants on company time; at these meetings various Employee Representatives vilified the S. W. O. C., warned against a strike, and exhorted the employees to "stand by" petitioner, to join the Plans and to stay away from "outside" unions (R. II, 877–878, 990–991, 1017–1019; III, 1714, 1801–1803, 1840–1845, 1860, 1863, 1935–1936, 1952–1953, 1978, 1980, 2095–2105, 2145, 2155–2164, 2166–2167, VI, 4451–4452, 4471, 4782–4789).

On May 20 petitioner shut down the Massillon Works, employing more than 3,000 persons (R. II, 846, 878–879; II, 1198–1199, III, 1940–1941, 1954–1955, IV, 2909). Union members were told by foremen "When we get through starving you out you won't want to strike" (R. II, 879; III, 1941, 1954–1955).[8] The plant remained closed through May 23 (R. II, 878; VI, 4254).

The lock-out of the Canton Tin Plate and Massillon employees, coming as the climax of many months of continuous and flagrant violations of the Act, threatened the very existence of the S. W.

[8] Prior to the shut-down, Smith, superintendent of the Massillon works, and other supervisory employees, had repeatedly stated at various employee meetings that if the S. W. O. C. "asked for recognition, we will shut this plant down" (R. II, 853, 867–868, 871–872, 879; III, 1911–1915, 1918–1922, 1938). Smith did not testify.

O. C. in petitioner's plants unless immediate measures were taken to halt petitioner's campaign of intimidation against the union (R. II, 880). On May 25, the day after the plants reopened, the union employees at the Canton and Massillon plants went on strike (R. II, 880, 992; II, 1309–1310, III, 1688, 1790–1791, 1866, IV, 3053–3055, 3063–3067, V, 3902). On May 26 the employees at Youngstown, Warren, Niles, and Cleveland joined the strike (R. II, 1020, 1037, 1069; III, 2243, 2381, 2386, 2515, IV, 2852).

All of the plants here involved remained closed from May 25 or 26 until the end of June, when they reopened under the protection of the Ohio National Guard (R. II, 881, 993–994, 1022, 1038; II, 1205; III, 2336, 2386, 2427–2428, 2440–2441, IV, 2867, 2908–2909, 2922, 2933, 2972, VI, 4304–4305, 4795, 4841). During the strike petitioner deliberately planned and incited hysteria and violence in order to terrorize union members (R. II, 883–884, 888–895, 992–994; II, 1130, 1133–1135, 1150–1163, 1255–1256, 1268–1269, 1290–1296, 1337, IV, 2817, V, 3800–3807, 3815–3816, 3822–3823, 3842–3843, 3856–3857, VII, 5718–5722). On July 11, a group of foremen and employees, whom petitioner had had deputized by the Massillon police made an entirely unprovoked attack upon an unarmed group of strikers at their headquarters, killing three and wounding many others (R. II, 898–945, 975–980; II, 1169–1192, 1230–1231, 1382–1387, 1396–1400, 1410–1414,

1423–1430, 1444–1448, 1464–1473, IV, 3293, V, 3459, 3569–3570, 3573, 3579–3580). The tear gas and firearms used had been donated by petitioner to the Massillon police (R. II, 884–885, 897–898, 979; II, 1136–1138, 1166, 1230–1231, 1269–1270, IV, 3026, 3031, 3288–3291, 3373–3374, V, 3391–3393).

When the plants finally reopened, eight employees were refused reinstatement because of their membership in the S. W. O. C. (R. II, 1023–1029, 1038–1041; III, 2242–2247, 2259–2264, 2292–2297, 2304–2317, 2342–2347, 2349–2362, 2427–2453. "New" labor organizations led in whole or in part by the officers of the Plans and amply aided by petitioner through use of time, property, and coercion by supervisory employees to secure memberships, appeared at some of the plants (R. II, 854–859, 994–995, 1021–1022; III, 1966–1974, 1989–1998, V, 3973–3976, 3988–39 1, 3995–4003, 4005, 4021–4023, VI, 4304–4317, 4326–4331, 4340, 4347, 4351, 4356–4357, 4366–4377, 4454–4455, 4484–4488, 4493, 4618–4621, 4716–4718).

The Board found that by the foregoing acts petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2) and (3) of the Act (R. II, 1079–1081) and that the strike was caused by petitioner's unfair labor practices (R. II, 1071–1075). The Board ordered petitioner to cease and desist from these unfair labor practices; to reinstate with back pay for appropriate periods the 26 persons, specifically named, who were dis-

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criminatorily discharged or refused reinstatement; to make whole the Canton Tin Plate and Masillon employees for losses of pay suffered by reason of the discriminatory lockouts; to offer reinstatement or placement upon a preferential list to the employees who went on strike, except certain employees convicted of serious offenses; to withdraw recognition from and disestablish the labor organizations found to be company-dominated; and to post appropriate notices (R. II, 1104–1109).

On October 20, 1938, petitioner filed in the court below its petition to review and set aside the Board's order (R. VII, 5173). The Board filed an answer thereto requesting that the petition to review be dismissed and that the Board's order be enforced (R. VII, 5208). On November 8, 1939, the court handed down its decision (R. VIII, 6277), enforcing the Board's order except as to the reinstatement of certain employees convicted of offenses deemed by the court to be of a sufficiently serious nature to preclude their reinstatement (R. VIII, 6290–6292). A decree was entered accordingly on January 2, 1940 (R. VIII, 6294).

ARGUMENT

I

THE BOARD'S FINDING THAT THE STRIKE WAS CAUSED BY PETITIONER'S UNFAIR LABOR PRACTICES IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Petitioner contends (Pet. 11–17, 25–35) that there is insufficient evidence to support the Board's

finding that petitioner's unfair labor practices constituted a substantial factor in causing the strike. The court below sustained the finding,[9] and petitioner's attack upon it presents no question of general importance. Compare *National Labor Relations Board* v. *Waterman Steamship Corp.*, No. 193, this Term, decided February 12, 1940.

Further, the evidence summarized in the Statement (*supra*, pp. 6–14) affords full support for the finding attacked by petitioner. After suffering petitioner's viciously antiunion campaign (*supra*,

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[9] The court said (R. VIII, 6287):

We think that this finding is supported by the evidence and must be sustained. It is true that the strike was precipitated by Republic's refusal to sign the union contract * * * It is equally clear, however, that the signing of the contract was sought by the union not to raise wages or improve working conditions, for it purported to do neither, but solely to put an end to the warfare between the union and Republic which had resulted from the latter's unfair labor practices. What was sought, as the clauses of the contract hereinabove quoted demonstrate, was a formal declaration and agreement by Republic that it would not continue those unfair labor practices but would recognize and not interfere with the right of its employees to become members of the union.

It is thus seen that the proposal to sign the contract was but a phase of the union's struggle against Republic's unfair labor practices and that the latter's refusal to sign was but one more indication that it proposed to continue those practices. * * * If the contract is refused, we cannot say that the refusal is the cause of the ensuing strike even though doubtless its acceptance would have averted it. The causes of the strike remain the unfair labor practices which the employer by his refusal of the proffered covenant of peace indicates that he will continue.

pp. 7–11) without defending itself, the S. W. O. C. informed petitioner on May 3 that the unrest of the men might result in a strike unless petitioner entered into negotiations concerning the contract proposed by the S. W. O. C., the plain purpose of which was to defend the union and the employees against petitioner's continuous violations of the Act (*supra*, pp. 11–12). Petitioner's blanket refusal, together with its blow at the existence of the S. W. O. C. by locking out the employees at two mills, directly led to the strike (*supra*, pp. 12–14). The facts are plain: failing to obtain assurance of any kind that petitioner would cease its illegal efforts to destroy it and seeing, instead, those efforts reach a crescendo not previously attained, the S. W. O. C. took the only remaining path—a strike. The responsibility plainly rests upon petitioner.[10]

[10] Petitioner relies (Pet. 25–30) upon an asserted inconsistency between the finding here and that made in *Matter of Inland Steel Co.*, 9 N. L. R. B. 783, order set aside, *Inland Steel Co. v. National Labor Relations Board*, decided January 9, 1940 (C. C. A. 7th). The asserted similarity between the two cases is thought to prove that here, as the Board found in the *Inland Steel* case, the strike was caused by petitioner's refusal to enter into a signed contract with the S. W. O. C. But both the Board and the court below recognized that this refusal was, in part, the immediate cause of the strike in this case; petitioner's contention does not reach the finding that the object of the request for a contract was to end petitioner's flagrantly illegal campaign against the union, and that the strike was thus precipitated by petitioner's rejection of the union's tender of means for removing the causes which were driving its members toward a strike, namely, the unfair labor practices. The conceded right of petitioner to reject this tender does not invalidate

II

THE ORDER TO REINSTATE STRIKERS WHO COMMITTED VARIOUS MISDEEDS IS NOT IN CONFLICT WITH THE *FANSTEEL* DECISION

Petitioner asserts (Pet. 35–41) that the reinstatement order, insofar as it includes employees who engaged in illegal acts during the strike, is in conflict with the decision in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. Both the Board and the court below gave effect to the *Fansteel* case by excluding from the reinstatement order strikers who had been convicted of serious offenses in the local courts (R. II, 1087–1093, VIII, 6290–6291).[11] Petitioner contends that the *Fansteel* case requires the exclusion also of certain strikers who were convicted of misdemeanors and punished by small fines or short jail sentences[12] and of other persons whose participation in various illegal acts for which they were not convicted petitioner offered to prove at the hearing (R. VIII, 6072–6132, 6157–6222).

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the Board's findings that the principal cause of the strike was petitioner's unfair labor practices, which the contract was intended to halt.

[11] The court below excluded certain employees whom the Board had included in the reinstatement order, among them two whose offenses drew only a $10 fine from the local court (R. I, 774, VIII, 6290–6291, 6297).

[12] These offenses were the ones which usually occur during an industrial dispute of some magnitude: e. g., being intoxicated, threatening in a menacing manner, acting as a "suspicious person," disturbing the peace, engaging in dis-

The *Fansteel* case does not require the denial of reinstatement to employees who, in the course of a strike brought about by the employer's violations of the Act, engaged in the types of minor misconduct which are the usual unfortunate accompaniment of labor disputes. *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3rd), certiorari denied, No. 418, this Term; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6th). See also Note, *Employee Misconduct Under the Wagner Act: Developments Since the Fansteel Case*, 39 Columbia Law Review 1369. The Board followed the plain intent of Congress [13] when it refused to become a police court for the trial of minor offenses, indulging instead a presumption "that any significant crime committed was investigated by the proper authorities and, if adequate evidence was found, was prosecuted by them" (R. II, 1085–1086).[14]

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orderly conduct, interfering with a police officer, committing nonaggravated assault and battery, rioting, assembling together to do an unlawful act (R. II, 1088–1089).

[13] Senate Report No. 573, 74th Congress, 1st Sess., pp. 16–17; House Report No. 1147, 74th Congress, 1st Sess., p. 16.

[14] The presumption was doubly justified in this case, where the evidence showed that the police and prosecuting authorities in the communities where the strike occurred were active during the strike and thereafter. Many hundreds of arrests were made and more than a hundred convictions were obtained.

The Board excluded those who had been convicted of substantial offenses and the court below added to that category; under these circumstances there was no departure from the *Fansteel* decision.

Petitioner contends (Pet. 41) that the decision below is in conflict with *National Labor Relations Board* v. *Bradford Dyeing Association*, 106 F. (2d) 119 (C. C. A. 1st), certiorari granted, No. 588, this Term. In that case the court held that the Board's findings that two employees had been discharged in violation of Section 8 (3) were not supported by substantial evidence and that alleged efforts by the two employees to promote a sitdown strike barred their reinstatement. The court's observation (quoted Pet. 41) that the Board may not reinstate employees who engage in such conduct "or any other unlawful acts" is *obiter dictum*.

III

THE COURT BELOW DID NOT IMPROPERLY APPLY SECTION 6 OF THE NORRIS-LA GUARDIA ACT

The Board held that petitioner's contention that all of the strikers should be denied reinstatement because, under principles of conspiracy and combination, all were responsible for all violence that occurred, should be considered in the light of Section 6 of the Norris-La Guardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70, 71).[15] And the Board

[15] Section 6 provides:

"No officer or member of any association or organization, and no association or organization participating or interested

found that there was no clear proof that the strikers generally had actually participated in, authorized or ratified the unlawful acts of individual strikers, and that they therefore were not barred from reinstatement (R. II, 1093–1094). The court below held that Section 6 applied to the proceeding before it for the enforcement of the Board's order, and pointed out that "No proof of actual participation, authorization or ratification was offered with respect to the strikers generally" (R. VIII, 6288).

Petitioner asserts (Pet. 41–44) that Section 6 is not applicable to proceedings under the National Labor Relations Act and that the court below should have applied principles of law apart from Section 6 in ruling upon the conspiracy contention. The legislative history of Section 6, however, reveals the broad intention of Congress wholly to abrogate for the federal courts the doctrine of conspiracy upon which petitioner relies.[16] Since the courts which must pass upon the validity of the Board's orders are forbidden to hold union mem-

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in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

[16] In its report on Section 6, the Senate Committee on Judiciary stated that—

* * * the doctrine that a few lawless men can change the character of an organization whose members and officers are very largely law-abiding is one which has been developed peculiarly as judge-made law in labor disputes, and it is high time that, by legislative action, the courts should be

bers responsible for unlawful acts without clear proof of actual participation, authorization, or ratification, the Board may, and indeed obviously should, consider this restriction in issuing its orders. Cf. *United States* v. *Morgan,* 307 U. S. 183, 190–191. In any event, proof of a conspiracy would not affect the Board's discretionary power to reinstate strikers not shown to have participated in the overt acts committed, even had no reliance been placed upon the Norris-LaGuardia Act by the Board or the court below.

Petitioner's argument (Pet. 43) that the holding of the court below on this point is inconsistent with Section 10 (h) of the National Labor Relations Act clearly lacks merit. That section provides that in proceedings for the enforcement or review of Board orders "the jurisdiction of courts sitting in equity shall not be limited by" the Norris-LaGuardia Act. The court below did not apply that statute in limitation of its jurisdiction. It applied a rule of substantive law enacted by Congress to change the prior law of combination and conspiracy; it did not purport to observe any of the jurisdictional limitations imposed upon federal courts of equity by the Norris-LaGuardia Act.

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required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. Senate Report No. 163, 72d Congress, 1st Sess., pp. 19–20. See also the report of the House Committee on Judiciary, House Report No. 669, 72d Congress, 1st Sess., pp. 8–9.

IV

OTHER QUESTIONS RAISED ARE CLEARLY NOT WORTHY OF REVIEW

1. *Reimbursement of governmental relief agencies.*—Petitioner challenges (Pet. 44–47) the provision of the back-pay order requiring petitioner to deduct from the payments to employees any sums which they have received for work performed upon work-relief projects and to pay such sums to the appropriate governmental agencies. The provision is now included in all orders of the Board providing for back pay, and has been enforced by every Circuit Court of Appeals which has thus far passed upon an order including it.[17] It seems plainly to be a desirable provision and well within the Board's statutory authority to require such affirmative action as will effectuate the policies of the Act (Section 10 (c)).[18]

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[17] *National Labor Relations Board* v. *National Casket Co., Inc.*, 107 F. (2d) 992 (C. C. A. 2d); *National Labor Relations Board* v. *Planters Mfg. Co.*, 105 F. (2d) 750 (C. C. A. 4th); *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, decided January 12, 1940 (C. C. A. 9th).

[18] Section 10 (c) of the Act contains no requirement that the employer be permitted to deduct from "back pay" sums earned by employees when they are out of work as a result of unfair labor practices. Petitioner accordingly cannot complain that the deductions here allowed are not the full amount earned by the employees, or that amounts which it could be required to pay the employees go instead to governmental relief agencies rather than to the employees, so that petitioner, instead of the public, may bear the burden of its illegal acts.

2. *Back pay to employees voluntarily reinstated by petitioner.*—The Board ordered petitioner to make whole certain employees for loss of pay during lock-outs and discharges by petitioner in violation of the Act (R. II, 1107–1108). The employees were voluntarily reinstated by petitioner before the strike. Petitioner contends that since the Board could not order reinstatement of the employees it could not, under Section 10 (c) of the Act, order back pay, and that the holding of the court below to the contrary is in conflict with *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646.

Petitioner quotes from the *Carlisle* case (Pet. 49–50) a discussion by Judge Haney of the question whether employees discharged in violation of the Act are disqualified from reinstatement and back pay when they obtain other regular and substantially equivalent employment, and thereby cease to be "employees" within the definition in Section 2 (3). The question here, however, does not concern employees who are asserted to have disqualified themselves from reinstatement and back pay by obtaining other employment. Moreover, the court in the *Carlisle* case held that the employees had not obtained other equivalent employment, and it enforced in full the Board's order as to all employees ordered reinstated. The statement of Judge Haney which petitioner quotes was, therefore, dictum. Finally, it was the opinion of but one judge: Judge Stephens, concurring, stated

that the question was not before the court and that no opinion concerning it should be expressed (99 F. (2d) 543). Judge Wilbur concurred in the result only (99 F. (2d) 544).

Petitioner's contention is, in effect, that it may avoid a back-pay order by itself reinstating the discharged employees at any time prior to issuance of the Board's order and thereby forestalling a reinstatement order. The holding of the court below to the contrary is obviously correct. Compliance is no bar to an order of the Board. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230.

3. *The single preferential hiring list.*—In addition to requiring that all available positions at the plants where strikes occurred be filled, without discrimination, from among the strikers and from those employed at the time of the strike but who did not join in it, the Board provided in its order that the names of each employee for whom no position was available be placed upon a preferential list for employment at certain of petitioner's plants, and that vacancies be filled from that list regardless of whether the employee previously worked at the particular plant where the vacancy occurs (R. II, 1108, 1095–1096).[19] Petitioner objects (Pet. 51–53) that this provision gives the strikers greater rights

[19] Under the Board's proposed order the preferential list applied to all of petitioner's plants (R. I, 573, 576–577). In its final decision the Board recognized the validity of peti-

than they would have enjoyed if no strike had occurred.

The challenged provision gives the strikers (and other employees thrown out of work by the strike) a preference over applicants for employment at the plants to which the list applies.[20] Since the strikers were compelled to leave their work in order to defend their right of self-organization against petitioner's illegal attacks, it is only fair that they should be preferred to newcomers. The Board was warranted in using every means consonant with justice to repair the economic havoc wreaked by petitioner's flagrant disregard of its obligations under the Act. The power to require reinstatement at a plant other than the one where the employee pre-

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tioner's objection that it would be inconvenient to employ the strikers at distant plants and restricted the operation of the preferential list to the plants located in Ohio, at Monroe, Michigan, and at Beaver Falls and Pittsburgh, Pennsylvania (R. II, 1095–1096).

[20] Petitioner's argument that an employee *laid off* at one plant would have no seniority right to be employed at another (Pet. 52) is beside the point. The necessary comparison is between what should be done for the strikers and the rights they would have enjoyed if no strike had occurred and they had continued working. There is no proof that they would have been laid off; petitioner might have transferred surplus employees to new plants or to other plants where experienced men were needed. It might have preferred such employees, whether still working or laid off, to new applicants. Petitioner cannot establish the invalidity of the provision in question by speculating that the strikers might have fared worse if there had been no strike than they will under the Board's order. Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265.

viously worked was sustained in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585, on contempt application, 97 F. (2d) 195 (C. C. A. 2d). Moreover, petitioner does not point to any way in which it is prejudiced by the expedient adopted by the Board.

4. *Adequacy of the charge.*—Petitioner complains that the charge did not name all of the employees who were alleged in the complaint to have been discriminatorily discharged, or catalogue in detail all the various unfair labor practices found by the Board to have caused the strike (Pet. 53–54). It asserts that the decision below, in upholding the sufficiency of the charge, is in conflict with *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 F. (2d) 97 (C. C. A. 2d).

In the *Hopwood* case the Board issued its order against both Hopwood and another corporation, whereas the charge filed had alleged unfair labor practices only on the part of Hopwood. The court held that the order could not properly issue against the other corporation since the Act had not been invoked against it, as Section 10 (b) requires. In a subsequent decision the Second Circuit made it clear that the Hopwood case did not involve the question whether the complaint and order issued against an employer named in the charge must be limited to unfair labor practices alleged in the charge. *National Labor Relations Board* v. *National Licorice Co.*, 104 F. (2d) 655, 658, certiorari

granted, No. 272, this Term, argued February 7, 1940.[21]

5. *Sufficiency of the hearing.*—Petitioner's assertions (Pet. 56–58) that it was never granted a hearing as to the charges made against it in the complaint are frivolous. Oral argument was had before the Board upon petitioner's exceptions to the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, and petitioner filed a brief in support of its exceptions (R. I, 782–832). The fuller statement of the proceedings set forth hereinbefore (see pp. 4–5, *supra*) shows that petitioner was afforded by the Board, both before its first order and again before the order enforced below, full opportunity to present its contentions and to meet the issues of the case.

6. *Sufficiency of the evidence.*—Petitioner's various contentions that the Board's findings that the lock-outs and discharges were unfair labor practices within the meaning of Section 8 (3) of the Act were unsupported by the evidence (Pet. 22–23, 34–35, 51, 54–56) are trivial. See *supra*, pp. 10–13. Similarly, in view of the overwhelming evidence that the "independent" unions were mere puppet

[21] The general question whether the complaint and order are limited to unfair labor practices alleged in the charge is before the Court for decision in the *National Licorice* case. See brief for petitioner in No. 272, pp. 20–24; brief for the Board, pp. 65–72. The present case involves simply the question of what degree of particularity is required in the allegations of unfair labor practices contained in the charge, not the question whether the complaint and order may include unfair labor practices not stated in the charge.

labor organizations (*supra*, pp. 6, 8–10, 15), the claim that petitioner should have been permitted to call several thousand employees who would have testified that they joined the puppet organizations freely (Pet. 24, 58–59) warrants no consideration by this Court. Cf. *National Labor Relations Board* v. *Brown Paper Mill Co.*, decided January 17, 1940 (C. C. A. 5th).

CONCLUSION

The petition presents no substantial question of public importance. The decision of the court below was correct in all respects and is not in conflict with any decision of this court or of any circuit court of appeals. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
THOMAS HARRIS,
Attorney.

CHARLES FAHY,
General Counsel,
ROBERT B. WATTS,
Associate General Counsel,
LAURENCE A. KNAPP,
Assistant General Counsel,
MORTIMER B. WOLF,
RUTH WEYAND,
Attorneys,
National Labor Relations Board.

FEBRUARY 1940.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair lobor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board, upon notice, may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirm-

ative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

The relevant provisions of the Norris-LaGuardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70, 71; 29 U. S. C., Sec. 101 *et seq.*) are as follows:

SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents except upon clear proof of actual participation in or actual authorization of such acts or of ratification of such acts after actual knowledge thereof.

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